IN THE

Supreme Court of the United States

No.

MAX SHAMOS,

Petitioner,
(Appellant below)

—against—

PEOPLE OF THE STATE OF NEW YORK,

Respondent.
(Respondent below)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

There was an extraordinary number of reversible errors committed upon the trial, beyond successful dispute. The first issue presented here arises on the most serious:

(1) Whether the admission of the testimony of an attorney against his former client involves a mere rule of New York State evidence and trial procedure, or whether the admission of that evidence:

> "Offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (Snyder v. Commonwealth of Mass., 219 U. S. at p. 105.)

(2) The second proposition is whether the aggregation of errors at the trial; including admission of damaging and highly incompetent proof; the vituperative and illegal sum-

mation of the District Attorney; and a charge of the Court so basically wrong and prejudicial as to deny a fair consideration by the jury of the only controverted defense (the identity of the defendant on his alleged one and only appearance, January 13, 1940); taken together:

> "* * * were such as to deprive petitioner of a trial according to the accepted course of legal procedure." (*Buchalter* v. *State of N. Y.*, 319 U. S. 427.)

POINT I.

The admission of the testimony of defendant's attorney, one Jacob J. Rosenblum, of confidential communications theretofore made to him by his client, the defendant, was a violation of the defendant's (petitioner's) fundamental rights.

The ruling is so shocking that this Court should make a pronouncement which will prevent such things re-occurring in the State of New York, or any other state.

In February, 1942, defendant went to Mr. Rosenblum and retained him to arrange an adjournment of the *Rose Cohen* case (fol. 467). She was then awaiting an order of commitment but she might be reprieved, if she made restitution (Rosenblum fols. 514, 519).

The purpose of the adjournment was to give the defendant time to raise funds to make restitution to the complainant and other victims, to the amount of $40,000 to $50,000 (Rosenblum fol. 454). Mr. Rosenblum told defendant he was doubtful whether he would accept the case and he refused to accept the retainer until he should satisfy himself of the truth of the defendant's story from one Dr. Reicher (fol. 446). He required that Dr. Reicher be brought to his office (fol. 416); cross examined him and learned these facts:

Dr. Reicher was under moral obligation to Rose Cohen who had recommended patients to him when he came to New York years before to practice medicine and at a time when he needed patients "quite badly" (Rosenblum fol. 425). Defendant was boasting of his wealth in seven figures from some invention (Rosenblum fol. 428), and Dr. Reicher besought defendant to make restitution for Rose Cohen (Rosenblum fol. 424). Defendant owed Dr. Reicher money which he expected to collect (fol. 384). So a chain of innocent acts was presented.

Mr. Rosenblum, admitting that both men denied complicity in the crimes (fols. 472, 562), told his client that his volunteering to make restitution would likely involve him in the crime and the District Attorney would think he was the real thief.

> "I think I should say this—on a number of occasions he did say that he did not receive any of that money, and I said to him at the time, 'The District Attorney, however, doesn't know it and *they may have an idea that maybe you are the thief in this thing.*'" (fol. 562). (Italics ours.)

Rosenblum insisted that he should be free to disclose the facts and identity of his client to the criminal authorities, and if indictment and trial followed, he should be free to testify against his client at the trial.

> "* * * so that I didn't find myself possibly in a part of this court where I could say, 'I would like to testify but I can't, because by law I am not permitted to'; it carries an inference—and I explained that to him" (fol. 434).

It was arranged that Rosenblum should apply for the adjournment without disclosing the identity of his client if possible; only in the event that Rosenblum took the case

(fols. 435-6); further provided that if the defendant failed to make restitution within the thirty day adjournment, the attorney should then disclose the identity of his client (Rosenblum fol. 477). Three days later, Rosenblum went to the District Attorney and obtained the adjournment without disclosing the names of his clients (Rosenblum fol. 474). Rosenblum accepted $1000 on account of $5000 of fees (fols. 479, 530). Not only did Rosenblum testify to these damning facts; but incredibly enough, he deliberately conveyed to the jury the impression that he believed his client was guilty.

> "A. He did on a number of occasions—I think I should say this—he did on a number of occasions say that he did not receive any of that money, and I said to him at the time, 'The District Attorney, however, doesn't know it and they may have an idea that maybe you are the thief in this thing—they have no way of telling—and there may be an investigation, and therefore I want to be relieved of this privilege.' I said, 'I don't doubt you, but I don't know whether you did or you didn't, but I have a specific job to do.'
>
> Q. And he denied it? A. Yes, but I never accused him of it because I didn't know. *Don't ask me what I thought*" (fol. 563). (Italics ours.)

When defendant's attorney protested against such proof going before the jury, the District Attorney aggravated the offense by emphasizing its force and effect. He answered the attorney's protesting question to the witness by volunteering the statement that the question that he (defendant's attorney) put to the witness "tries to leave the implication that Mr. Rosenblum believed the defendant to be an honest man" (fol. 564).

To cap the climax, the trial judge then intervened. Instead, however, of directing the withdrawal of a juror, or

instructing the jury to disregard the evidence, or criticizing the witness for willfully smearing his client, the judge put to the witness a question tending to excuse the witness of having failed to accuse his client of larceny; thus cementing in the minds of the jury the establishment of defendant's guilt.

> "The Court: I think Mr. Rosenblum said he did not accuse him because he did not know.
>
> The Witness: That is right and I want the jury to know I have no knowledge either way" (fol. 564).

Mr. Rosenblum had been portrayed to the jury as a former prominent Assistant District Attorney in charge of the Homicide Bureau, a trustbuster, a member of a Wall Street firm (fols. 407-410; 1144, 1201). Of course, defendant's chances of a fair consideration by the jury went aglimmering, when they heard defendant's confession:

> "* * * to his own lawyer who stands almost in the position of his own rabbi or priest" (District Attorney's Summation, fol. 1122).

POINT II.

Under the law of the State of New York, and under the unanimous decisions of the courts of this country, the attorney (Rosenblum) was forbidden to disclose the identity of his client or any remark that his client made because of their confidential relationship.

The Civil Practice Act, which is the controlling statutory law of the State of New York, provides as follows:

> "*Sec. 353. Attorneys and their employees not to disclose communications.* An attorney or counselor at law shall not be allowed to disclose a communication, made

by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon."

The improper testimony of the attorney was admitted by the trial judge upon two grounds. The first was that the client at the time he consulted his attorney in February, 1942, gave an oral waiver of the privilege (fol. 440). This did not make the testimony competent. Indeed, the seal on the attorney's lips would not amount to very much if the attorney was allowed to destroy the privilege by swearing to a waiver. It is the client and not the attorney who must do the waiving. The State of New York has gone to the extent of specifically providing that any waiver given by the client previous to the attempted testimony of the attorney is insufficient even if that waiver be in writing. We quote from Section 354 of the Civil Practice Act:

"*Sec. 354. Application of sections relating to confidential communications.* The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. * * * The waivers herein provided for must be made in open court, on the trial of the action or proceeding, and a paper executed by a party prior to the trial providing for such waiver shall be insufficient as such a waiver."

The testimony of an attorney to confidential communications is barred as a matter of fundamental right, and is indispensable for the administration of justice.

"If a person cannot consult his legal adviser without being liable to have the interview made public the

next day, by an examination enforced by the Court, the law would be little short of despotic, it would be a prohibition upon professional advice and assistance." (Insurance Co. v. Schafer, 94 U. S. 457.)

"The general rule is not disputed, that confidential communications between client and attorney are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose, and the law holds that testimony incompetent." (Chirax v. Reinicker, 11 Wheat. 280.)

In speaking of this rule, we find in "Thornton on Attorneys At Law, Vol. I, Chapter VI, Privileged Communications" the following pertinent language:

"The very application of this rule, from a very early period in the history of the law, has been upheld by the courts as of supreme importance in the administration of justice; and it has wisely been left untouched by any of the statutes in modern times which have so liberally removed restrictions from the rules of evidence * * * " (p. 156).

"The rule as to privileged communications was applied, apparently for the first time, in the case of Berd v. Lovelace, and for three centuries at least it has been steadily upheld by the courts on the ground that, for the proper administration of the law, the confidence which it encourages the client to repose in the attorney to whom he resorts for legal advice and assistance, should upon all occasions be inviolable, because greater mischiefs would

probably result from requiring or permitting its disclosure than from wholly rejecting evidence thereof. The rule is not one of mere professional conduct" (p. 158).

See also Wigmore on Evidence, 3rd Edition, Vol. VIII, Communications between Attorney and Client, Sections 2290 to 2329.

POINT III.

The confidential communications made by the defendant to attorney Rosenblum did not lose their privileged character because of the presence of a third party, Dr. Reicher, as claimed by the District Attorney.

When the defendant went to Mr. Rosenblum with his story, he was told by the attorney that the attorney would have to investigate further before he would decide whether to take the case or not (Rosenblum fol. 431). He required the defendant to bring to his office Dr. Reicher (Rosenblum fol. 416). Then the attorney cross-examined Dr. Reicher and obtained corroboration of the defendant's story, including among other things, that it was he, Dr. Reicher, who was intervening on behalf of Rose Cohen and trying to get the defendant to make restitution because he, the defendant, was a "dear friend" who owed him (Dr. Reicher) money which he expected to be repaid (fol. 384).

Attorney Rosenblum treated both Dr. Reicher and Shamos as joint clients.

> "Mr. Shamos and Dr. Reicher were advised by Mr. Rosenblum that the circumstances were unusual and that there was some possibility that investigation might be started since the District Attorney may get the idea that they were the persons who received the proceeds of the moneys obtained from Mrs. Cohen" (fol. 472).

Mr. Rosenblum went to the extent (a strange substitute for legal evidence) of repeating to the jury how he had previously expressed to the District Attorney doubts of his client's innocence.

> "* * * I explained to Mr. Gelb (Assistant District Attorney) very fully that I didn't know just what the position of these people was, whether they were involved or whether not involved, that it was very unusual, that the circumstances were very peculiar, but that I could not see how Mr. Gelb could be harmed any, or that Rose Cohen could be harmed any, or that any of the victims could be harmed any, if my purpose were to come in to insist that restitution was made" (fol. 453).

Mr. Rosenblum's formal memorandum of February 25, 1942 shows he treated the two men as one client.

> "Mr. Rosenblum was advised *by all parties concerned* that it was agreeable for him today, on February 25, 1942, to proceed * * *" (fol. 476).

This was so from the beginning:

> "I explained to *them* that the crime was a most serious one * * *" (fol. 430).
>
> "*They* asked me if I would take the case and I told *them* that I couldn't tell *them*; I told *them* I wasn't entirely sure whether I cared to take this case" (fol. 431).
>
> "I told *them* that I wanted to consider the matter fully and *they* wanted to know why" (fol. 431).

An arrangement was made with Attorney Rosenblum so that if defendant and Dr. Reicher ever became involved through the efforts at restitution, Dr. Reicher would go with Rosenblum, as his attorney, as well as the defendant, and they would both answer any questions the Court would propound.

"Mr. Rosenblum, however, was first to advise the Judge that he would prefer not to reveal the names until the thirty day period had elapsed, and that at that time either Mr. Shamos or Dr. Reicher or both would be then willing to go with Mr. Rosenblum and see Judge Donnellan and answer any questions that he would put to them regarding this matter" (fol. 477).

The law in the State of New York is that the presence of a third person does not destroy the privileged character of the conference provided the third person also stands in the same confidential position as the client against whom the attorney is asked to testify. Furthermore, if the third person is used as a means of communication between the attorney and the client, he then, also, becomes a party to the privilege.

People v. *Buchanan*, 145 N. Y. Page 1, at page 26;
Wigmore on Evidence (Paragraph 2312) citing
Wallace v. *Wallace*, 216 N. Y. page 36.

The statement of what these two men said to the District Attorney and the Judge of General Sessions through their mouthpiece, attorney Rosenblum, in their effort to aid justice through restitution again was a privileged communication. (Thornton on Attorneys at Law, Volume I, Chapter VI, Section 104.)

IN CONCLUSION.

It is not necessary for us to argue in detail the complete absence of due process of law in the trial of Max Shamos. There was a plethora of reversible errors. We have not referred to the less important.

(a) The District Attorney in his summation vouching for the honesty and credibility of the complainant (fol. 1133).

(b) His extended, unfounded accusation (and defense thereto) that defendant's attorney was accusing him, the District Attorney, of subornation of perjury (fols. 1188-1195).

(c) His attempt to prejudice the jury against defendant for defendant's failure to take the witness stand (fols. 1229-1230).

(d) His accusation that Rose Cohen and Julia Weinstein were the dupes of defendant, in the complete absence of any direct or circumstantial evidence.

> "* * * or is it a fact that this dirty swindler sat in room after room with Rose Cohen and Julia Weinstein and sold them a bill of goods like you have never seen in your lives" (fol. 1133).

(e) His appeal to the jury that defendant was the actual thief, based on defendant's luxurious living (fol. 1159).

We pass all these things to come to that proposition which affects the administration of justice in every case.

An attorney was allowed to testify to confidential communications made to him by a client; permitted to go on to say that although the client denied guilt, his statements to his attorney implicated him in the crime; and to finally add, without judicial restraint or reproof, to swear that he, the attorney, was satisfied of the client's guilt, and failed to prosecute him because he didn't have legal evidence. It is time for the Supreme Court of the United States to step in with a ruling that the Fourteenth Amendment of the United States Constitution cannot be thus flouted.

Respectfully submitted,

ALVIN CUSHING CASS,
Attorney for Petitioner.